

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DARRYL WILLIAMS)	
)	CIVIL ACTION
v.)	
)	
KENNETH D. KYLER)	NO. 02-1255
)	
)	

MEMORANDUM

____ Before the Court is Darryl Williams' Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 ("Petition"). For the reasons that follow, the Court denies the Petition in all respects.

I. BACKGROUND

Petitioner Daryl Williams was convicted on February 14, 1989 in the Court of Common Pleas of Philadelphia County of first degree murder and possession of an instrument of the crime. The charges stemmed from an October 21, 1987 incident in which Williams fired a gun into a crowd of people gathered in the street, striking and killing one of them. Because the jury was unable to reach a unanimous verdict during the sentencing phase, the judge sentenced Williams to life imprisonment for the murder and to a concurrent sentence of two and one half to five years imprisonment for the possession charge.

Williams appealed to the Superior Court of Pennsylvania, which affirmed the judgment of sentence on February 20, 1990. He did not request allocatur of this decision from the Supreme Court of Pennsylvania. On June 18, 1992, Williams filed a *pro se* petition

for relief under the Pennsylvania Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546. On January 9, 1997, the PCRA court dismissed his petition with prejudice, and the Superior Court affirmed the order of dismissal on November 9, 1997. The Pennsylvania Supreme Court denied William's request for allocatur on May 13, 1998.

On April 10, 2000, Williams filed a second PCRA petition, alleging for the first time that the jury instructions given at his trial were defective under Cage v. Louisiana, 498 U.S. 39 (1990), because they permitted the jury to find him guilty based upon a standard lower than beyond a reasonable doubt. This petition was dismissed as untimely by the PCRA court on October 5, 2000. On September 14, 2001, the Pennsylvania Superior Court affirmed the dismissal, and the Supreme Court denied Williams's request for allocatur on February 6, 2002. On March 11, 2002, Williams filed the instant petition for a writ of habeas corpus, his first. Williams again alleged in his petition that his jury instructions were unconstitutional under Cage. In accordance with 28 U.S.C. § 636(b)(1)(B) and Local Rule of Civil Procedure 72.1, this Court referred the Petition to United States Magistrate Judge Linda K. Caracappa for a Report and Recommendation. The Magistrate Judge filed a recommendation that the petition be denied as time-barred. Williams in turn filed an objection to the report and recommendation, arguing that the holding of Cage should be applied

retroactively, and that the retroactive application of Cage must toll the statute of limitations in this case. In accordance with 28 U.S.C. § 636(b), the Court will conduct a de novo determination of the issues raised.

II. DISCUSSION

A. Statute of limitations for Habeas Petitions

Title 28 United States Code Section 2244 (d)(1) provides for a 1 year statute of limitations period for bringing petitions, running from the latest of:

- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
- (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
- (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1). Subsection 2 of the statute further provides that the filing deadline shall be tolled during any period when a properly filed application for State post conviction relief is pending.

The Magistrate Judge found that the 1 year statute of

limitations for the filing of Williams' petition began to run on May 13, 1998, the date on which the Pennsylvania Supreme Court denied allocatur of the Superior Court's denial of Williams' first PCRA petition.¹ Because Williams' petition was filed on September 14, 2001, more than three years later, the Magistrate Judge held the petition time barred.²

Williams argues that his petition is not time barred, because his claim rests on a new rule of Constitutional law handed down in Cage v. Louisiana, 498 U.S. 39 (1990), which was decided by the United States Supreme Court ("Supreme Court") on November 13, 1990, eight months after Williams' conviction became final on March 22, 1990.³ Thus, Williams argues that the limitations period should be tolled by 28 U.S.C. § 2244(d)(1)(C), which provides that the statute of limitations will run from the date that the Constitutional right was initially recognized by the Supreme Court, if the right has been made retroactively applicable to cases on collateral appeal. Williams argues that, because the Supreme Court

¹ Because Williams' second PCRA petition was untimely filed, the Magistrate Judge found that its filing did not work to toll the statute of limitations period.

² Although Williams did assert a Cage claim in his habeas petition, the Magistrate Judge did not address the implications of such a claim on the tolling portion of the statute.

³ As Williams did not petition the Pennsylvania Supreme Court for review of the Superior Court's decision of February 20, 1990 affirming his conviction, his conviction became final at the expiration of the time to file such a petition, or 30 days after the Superior Court decision. See Pa. R.A.P. 903 (a).

has not yet decided whether Cage should be applied retroactively, the 1 year statute of limitations has not yet begun to run on his claim.

B. The Application of Cage to the Statutory Tolling Provision of AEDPA

The first question the Court will consider is whether the assertion of a legitimate Cage claim works to toll the statute of limitations under 28 U.S.C. § 2244(d)(1)(C). There is currently no precedent in the United States Court of Appeals for the Third Circuit ("Third Circuit") or in the Supreme Court which holds Cage retroactive to cases on collateral appeal. Moreover, courts in different circuits have presented vastly different approaches to the tolling question where no court in the jurisdiction has yet spoken on the retroactivity question.

The Supreme Court in Tyler v. Cain, 533 U.S. 656 (2001), recently considered the retroactive application of Cage, but in the context of a successive habeas petition. The Tyler Court held (five to four) that a new rule of constitutional law can be made retroactive in the context of a successive petition only if the Supreme Court specifically holds it to be retroactive on collateral appeal. Id. at 663. Thus, the Court held that a rule cannot be made retroactive based either on a decision of a lower court or based upon the dicta of the Supreme Court. Id.

The Court then declined to decide whether Cage should be made retroactive for purposes of a successive petition. The Court noted

that AEDPA requires dismissal of a successive petition unless the rule on which the claim was based had previously been held retroactive by the Supreme Court. The Court therefore reasoned that it would be required to deny Tyler's petition regardless of whether Cage were held retroactive in the current proceedings. Thus, any decision on Cage's retroactivity would be dicta. Id. at 667-68.

Tyler overruled a Third Circuit opinion, West v. Vaughn, 204 F.3d 53 (3d Cir. 2000), abrogated sub. nom. by Tyler v. Cain, 533 U.S. 656 (2001). West had held, also in the context of a successive petition, that a circuit court could make a new rule retroactive on collateral review. The court then went on to hold Cage retroactive to cases on collateral appeal.

The holding in Tyler is not directly applicable to Williams, however, because this is his first petition. Moreover, it is not clear whether the holding in Tyler is applicable to the statute of limitations provision in AEDPA. The language used in the successive petition and statute of limitations sections of AEDPA is similar, but there exists a significant distinction. Under section 2244(b)(2)(A), a successive petition must be dismissed unless the claim relies upon a new rule of law "...made retroactive to cases on collateral review by the Supreme Court." 28 U.S.C. § 2244(b)(2)(A). By contrast, section 2244(d)(1)(C) states that a one year statute of limitations should run from the date that the

right is initially recognized by the Supreme Court "...if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2244(d)(1)(C).

A number of circuits have recognized that this distinction in wording may allow circuit and even district courts to decide, for statute of limitations purposes, the retroactivity of a new rule of Constitutional law.

For example, Ashley v. United States, 266 F.3d 671 (7th Cir. 2001), confers upon district and circuit courts the right to decide questions of retroactivity in the first instance. The facts are quite similar to those in the instant case. In Ashley, the United States Court of Appeals for the Seventh Circuit was presented with a first habeas petition of a prisoner who argued that he was convicted in violation of Apprendi v. New Jersey, 530 U.S. 466 (2000). The Supreme Court did not determine in the Apprendi decision whether the holding was retroactive to cases on collateral review, and no circuit court at the time had yet decided the question. The Ashley court first held that the omission in Section 2244(d)(1)(C) of an explicit requirement that the Supreme Court make the retroactivity determination implied that lower courts could make this determination. Ashley, 266 F.3d at 673. The court listed three reasons justifying such a distinction. First, allowing a district or appellate court to decide the issue may be

necessary to bring the case before the Supreme Court in the first place. Second, the AEDPA only allows circuit courts 30 days to determine whether a successive petition should be granted. By contrast, there is no time limit imposed upon the district court in first petition cases, leaving appropriate time for considering the merits of a retroactivity question. Finally, the court argued, it is logical that the demands on successive petitions would be more strict than the demands on initial petitions, as a petitioner in the former case has already had a prior opportunity to bring the claim. Id.

The court then addressed the wording in Section 2244(d)(1)(C) indicating that the limitations period must run from the date that the right is initially recognized by the Supreme Court. The Court held that, notwithstanding the literal language of the statute, the limitations period must run from the date that the decision is made retroactive. Otherwise, the court noted, the statute would have no functional utility, as a retroactivity decision will often come more than one year after the decision creating the new right. Id. at 673-74.

Finally, the Ashley court considered the question of whether, in a case where neither the Supreme Court nor any court in the circuit had yet determined the retroactivity question, the district court could make this determination in the first instance. The Court noted that nothing in the statute precluded the district

court itself from holding that a decision applied retroactively. Id. at 674. The court reasoned, moreover, that a contrary holding would force prisoners whose convictions became final more than one year before the decision creating a new right was handed down to "queue up" and wait, perhaps indefinitely, until a court in their jurisdiction decided the retroactivity question. Id.

Thus, the court in Ashley held that the district court should determine in the first instance whether a new rule should be applied retroactively in cases where the timeliness of the petition is dependant on such a retroactivity determination. Id. The retroactivity determination would therefore determine the timeliness of the petition. If the decision were not held retroactive, the petition would be dismissed on statute of limitations grounds. If, on the other hand, the district court found the new rule to be retroactive, the one year statute of limitations would begin to run from the date of such holding. Id.

The Third Circuit has not yet had the opportunity to decide the question addressed in Ashley. In United States v. Lloyd, 188 F.3d 184, 188 (3d Cir. 1999), decided before Tyler, the Third Circuit expressly reserved this question because both the Supreme Court and the Third Circuit had declared the rule at issue in that case to be retroactive, and petitioner's claim was filed within one year of both decisions. In United States v. Pinkston, 153 F. Supp. 2d 557, 560 n.3 (M.D. Pa. 2001), a district court was faced

with a situation similar to Ashley. The petitioner in that case brought a first petition challenging his conviction based on Apprendi, which the Third Circuit, like the Seventh Circuit, had not yet declared retroactive. The court in Pinkston noted the distinction in language between the retroactivity and successive petition portions of the AEDPA discussed *supra*, and therefore held that Tyler did not control the issue. The court held, however, that, regardless of whether the *circuit* court might be allowed to consider the retroactivity question, it did not read Lloyd or any other precedent as permitting the district court to make this determination. The court therefore held that the petition was time barred. Id.⁴

⁴No other circuit has directly followed Ashley's lead. In In re Vial, 115 F.3d 1192, 1197 n.9(4th Cir. 1997), the United States Court of Appeals for the Fourth Circuit stated in dicta, in a pre-Tyler opinion, that until the Supreme Court decides that a new rule is retroactive on collateral review, the statute of limitations does not begin to run. The United States Court of Appeals for the Ninth Circuit is in accord with the Fourth Circuit's approach. United States v. Valdez, 195 F.3d 544 (9th Cir. 1999).

The United States Court of Appeals for the Fifth Circuit, in United States v. Lopez, 248 F.3d 427 (5th Cir. 2001), held that a circuit court may make the determination of retroactivity. However, the Lopez court also held that the statute of limitations runs from the date that the Supreme Court creates the new rule, and not from the date that the retroactivity determination is made. Id. at 433. While perhaps the most faithful to the language of the AEDPA statute, this approach, as the court notes in Ashley, makes the tolling provision "illusory", because the determination of retroactivity may likely come more than one year after the holding creating the new rule.

The United States Court of Appeals for the Sixth Circuit, like the Third Circuit, has declined to decide whether a district or appellate court may make the retroactivity determination. Pryor v. United States, 278 F.3d 612 (6th Cir. 2002).

This Court finds the reasoning of Ashley persuasive, and therefore determines that it possesses the power to determine whether Cage should be applied retroactively in this case. First, as the Ashley court noted, there is a clear distinction in wording between the statute of limitations and successive petition portions of the AEDPA, and this Court would be unfaithful to this difference in language if it held that only the Supreme Court could make the retroactivity determination for statute of limitations purposes. The fact that Congress created a statutory scheme which only allows the Circuit Court thirty days to decide the merits of a successive petition, while providing an unlimited time frame for a court to decide the merits of a first petition, further indicates that Congress intended that the lower courts would make the retroactivity determination for statutory tolling, but not successive petition, purposes.

Further, if the lower courts can make the retroactivity determination in such instances, there seems to be little basis for holding that only the circuit, and not the district courts, can do so. Indeed, such a holding would be patently unfair to those petitioners with claims which implicate a new rule of constitutional law whose convictions become final more than one year after the statute of limitations expires, as they would be forced to wait, perhaps indefinitely, for a petitioner with standing to appeal his claim to the circuit court. It is logical,

therefore, to allow the district court to make the initial determination of retroactivity, and to start the statute of limitations period for the petitioner at the time the court makes the determination, if the court indeed determines that a decision should be applied retroactively to petitioner.⁵ It is true, as the court noted in Pinkston, *supra*, that the Third Circuit in Lloyd did not speak to the question of whether a district court could make the retroactivity determination. The court in Lloyd, however, had no reason to speak to this question, and thus there is no reason to assume that the court's failure to do so implies that district courts have no such authority.

Having concluded that this Court has the authority to decide the question, we determine that Cage should be applied retroactively to cases on collateral appeal. Under the AEDPA, a conviction cannot be overturned unless it is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United

⁵The Court recognizes that a district court's holdings do not have precedential effect either in its own district or in any other court system, and thus that a determination of retroactivity in a particular case would not bar another district court in the same district from reconsidering the issue and coming to a contrary conclusion until such time as a decision with precedential value was handed down by the circuit or Supreme Court. Threadgill v. Armstrong World Industries, Inc., 928 F.2d 1366 (3d Cir. 1991). Thus, while the Court holds that the statute of limitations for the petition at issue begins to run on the date the retroactivity determination is made by the district court, such a determination would have no effect on other, subsequent petitioners.

States." 28 U.S.C. § 2254 (d)(1). In Williams v. Taylor, 529 U.S. 362, 379-80 (2000), the Court held that this rule was a codification of Teague v. Lane, 489 U.S. 288, 310 (1989), which held that new law, decided after a petitioner's conviction, could not be used in a habeas petition to challenge the conviction. The rule in Cage clearly qualifies as a "new rule" under Teague and the AEDPA, as no Court decision before it had ever invalidated a State court conviction solely on the basis that the jury charge improperly described the state of mind required for conviction. See Victor, 511 U.S. 1, 6 (1994) ("In only one case have we held that a definition of reasonable doubt violated the Due Process Clause"). Thus, the Cage rule clearly "breaks new ground or imposes a new obligation on the States or the Federal Government." Teague, 489 U.S. at 301. Courts have thus universally held Cage to be a new rule. See e.g. In re Smith, 142 F.3d 832, 835 (5th Cir. 1998) ("It is undisputed that Cage announced a new rule of Constitutional law.") As such, the Cage rule cannot be applied retroactively unless it fits within two narrow exceptions to the general rule, as delineated in Teague. The exception relevant here applies where the rule can be classified as a "watershed rule [] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." Graham v. Collins, 506 U.S. 461, 478 (1993). The Supreme Court's decision in Sullivan v. Louisiana, 508 U.S. 275 (1993), strongly supports a finding that

Cage represents such a watershed rule. Sullivan held that a Cage instruction creates a "structural defect" in the trial proceedings that is not amenable to harmless error analysis. Id. at 281 (citing Arizona v. Fulimante, 499 U.S. 279, 309 (1991)). The Court reasoned that a Cage instruction, or any instruction that allows a jury to convict using a less stringent standard than proof beyond a reasonable doubt, renders the entire verdict void. Id. Thus, whenever a jury convicts a defendant using a lesser standard, the verdict itself is meaningless, and it is as if no jury verdict has been rendered at all. Id. at 280. This, in turn, deprives a defendant of his 6th Amendment right to a jury trial. Id.

A holding that a defendant has been denied his most basic due process right to a jury trial surely qualifies as a "bedrock procedural element" that "seriously diminish[es] the likelihood of obtaining an accurate conviction." Teague, 489 U.S. at 314. Like the right to counsel announced in Gideon v. Wainwright, 372 U.S. 335 (1963), a commonly cited example of the type of watershed rule of criminal procedure contemplated by Teague, the Cage rule clearly "implicat[es] the fundamental fairness and accuracy of the criminal proceeding." Saffle v. Parks, 110 S.Ct. 1257, 1264 (1990). Moreover, the majority of circuit courts which have considered the question have held Cage retroactive to cases on collateral review which were timely brought, and have based their holdings upon Teague's "watershed rule" exception. See Gaines v. Kelly, 202 F.3d

598, 605 (2d Cir. 2000) (holding Cage to apply retroactively and collecting cases from other circuits in support of this finding).⁶

C. Williams' Claims Do Not Implicate the Holding in Cage v. Louisiana

Williams, however, cannot properly invoke the tolling provision of AEDPA in this case, because the Court finds that he has not validly asserted a claim based upon the holding in Cage (or any other new rule of law which can properly be held to be retroactive to cases on collateral review.) Cage held a jury instruction unconstitutional which contained the following language:

Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. *It must be such doubt as would give rise to a grave uncertainty, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. It is an actual substantial doubt. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a moral certainty.*

498 U.S. at 40 (quoting State v. Cage, 554 So.2d 39, 41 (La. 1989) (emphasis added by U.S. Supreme Court)). The Supreme Court held that "a reasonable juror could have interpreted the instruction to

⁶ The Court also notes that the Third Circuit in West, 204 F.3d at 63, specifically determined that Cage should apply retroactively, albeit, as discussed, *supra*, in the context of a successive habeas petition in which they had no authority to make such a determination.

allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." Id. at 41.

The allegedly offensive portion of Williams' jury charge is quite different from the instruction held unconstitutional in Cage. The instruction reads as follows:

Furthermore, the defendant is presumed innocent throughout the trial and remains so unless and until you conclude, based upon a careful and impartial consideration of the evidence or lack of evidence, that the Commonwealth has proven him guilty beyond a reasonable doubt.

(N.T. at 668). Williams argues that it is reasonably likely that this instruction was interpreted by the jury to allow the prosecution to meet its burden of overcoming reasonable doubt by pointing to the lack of evidence presented by the defendant. Williams therefore argues that, because under a reasonable doubt standard the defendant can never be under any burden to produce evidence in his own defense, this instruction violated Cage by allowing the jury to convict using a standard lower than beyond a reasonable doubt.

This Court has found no case which has applied Cage to the language used in this jury charge. Cage and its progeny concern language which attempts to define the concept of reasonable doubt itself, by describing the state of mind and level of certainty jurors must arrive at before they may convict a criminal defendant. Cage and its progeny do not concern language which defines the

burdens faced by the prosecution and defense when presenting the evidence used by the jury in making its reasonable doubt determination. See Gaines, 202 F.3d at 603 (noting that, while Cage was the first case to reverse a State court conviction based upon a court's definition of a reasonable doubt standard, cases prior to Cage had reversed state convictions based upon unconstitutional burden shifting instructions.) The language of the Cage opinion itself makes this point clear. In Cage the Supreme Court wrote that "It is plain to us that the words 'substantial' and 'grave', as they are commonly understood, suggest a higher *degree* of doubt than is required for acquittal under the reasonable-doubt standard." Cage, 498 U.S. at 41 (emphasis added). Decisions subsequent to Cage also uniformly deal with instructions attempting to define the degree or magnitude of certainty required for proof beyond a reasonable doubt. For example, in Victor, 511 U.S. at 7, the Court considered a jury instruction which defined reasonable doubt as doubt which ". . .leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, *to a moral certainty*, of the truth of the charge." Id. at 7 (quoting jury instructions).

In support of Cage's applicability to the instant case, Williams points to Tyler v. Cain, 533 U.S. 656 (2001), which considered whether Cage should be applied retroactively in the context of a successive habeas petition (see *supra*). The Tyler

Court defined the holding in Cage as follows:

A jury instruction is unconstitutional if there is a reasonable likelihood that the jury understood the instruction to allow conviction without proof beyond a reasonable doubt.

Id. at 658.⁷ Additionally, the dissent in Tyler defined Cage's holding even more broadly as a "...misdescription of the burden of proof." Id. at 674 (Breyer, J., dissenting).

However, the actual instruction at issue in Tyler was "substantively identical" to the instruction held unconstitutional in Cage. Id. at 659. Thus, this instruction contained the same offensive language concerning "grave uncertainty" and "moral certainty" present in the Cage instruction.

Moreover, a survey of case law before Cage indicates that Williams is attempting to read the holding of Cage too broadly. Williams essentially asks this Court to attribute to Cage the broad premise that the prosecution must prove each element of the criminal offense beyond a reasonable doubt. However, the Supreme Court made clear long before Cage (and long before Williams' conviction) that the prosecution must prove every element of the

⁷In actuality, Cage defined the constitutional test as whether "a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the due process clause." 498 US at 41. The less stringent "reasonable likelihood" language quoted in Tyler is from Boyd v. California, 495 U.S. 924 (1990). In Estelle v. McGuire, 502 U.S. 62, 73 n.4, the Supreme Court rejected the Cage language quoted here in favor of the language found in Boyd and attributed to Cage in the Tyler opinion.

crime charged beyond a reasonable doubt for a defendant to be convicted. See In re Winship, 397 U.S. 358 (1970). Indeed, the jury charge at issue here, if it is invalid at all, seems most analogous to the charge invalidated in Francis v. Franklin, 471 U.S. 307 (1985).⁸ Francis concerned a jury charge which created a rebuttabal presumption on the issue of intent once certain predicate facts were established by the prosecution.⁹ The Supreme Court held that any instruction which a reasonable juror could have understood to shift the burden of persuasion to the defendant unconstitutionally relieved the prosecution of its burden to prove every element of the crime beyond a reasonable doubt. Id.

It appears, therefore, that Cage involves an unconstitutional definition of the reasonable doubt standard, which runs afoul of the Constitution by allowing the jury to convict when they possess an insufficiently certain state of mind concerning the defendant's guilt. Williams' claim does not fit within this definition, and therefore Cage cannot be considered a proper basis for Williams'

⁸ As Francis was decided well before Williams's original conviction, it cannot, of course, work to toll the statute of limitations in this case. Williams did not cite the Francis holding in his brief, and avoided predicating his claim on Francis in oral argument. Nevertheless, the Court finds that petitioner's claims must properly be characterized as invoking the rule in Francis.

⁹ Francis, in turn, was an extension of the Court's holding in Sandstrom v. Montana, 442 U.S. 510 (1979), which held unconstitutional mandatory or irrebutable presumptions concerning elements of the crime.

constitutional objections.

D. Petitioner's Claims Fail on the Merits

Even assuming, *arguendo*, that Williams' claims implicate the holding in Cage, his petition must still fail on the merits.¹⁰ In Victor, 511 U.S. at 13, the Supreme Court held that, in considering the effect of the charge on the jury, a court must examine the instructions as a whole, and cannot consider portions of the instructions out of context.¹¹

¹⁰ A question still exists as to whether Williams' claims have been procedurally defaulted under Pennsylvania law. The procedural default issue was not raised in either of the parties' submissions. The record is unclear as to whether Williams' attorneys ever objected to the jury charge as given in Williams' trial. Moreover, despite the fact that Cage was decided two years before Williams' first PCRA petition in 1992, Williams apparently never raised a Cage claim in that petition. The Court considering Williams' second PCRA petition found Williams' claims time barred under PCRA because Williams failed to file his PCRA claim within one year of the date his conviction became final or within 60 days of a United States or Pennsylvania Supreme Court decision holding Cage retroactive on collateral review. Commonwealth v. Williams, No. 3237 (Pa. Super. 2001); see also 42 Pa. C.S.A. § 9545 (b). This Court need not reach the question of procedural default, however, because a court may deny a petitioner's claim on the merits notwithstanding any failure to exhaust State Court remedies. See 28 U.S.C. § 2254 (b)(2). This seems an appropriate case in which to do so, considering that Williams clearly cannot prevail on his substantive claims. See West, 204 F.3d at 63 (bypassing exhaustion question and dismissing petition on merits where "the merits are clearly against the petitioner").

¹¹ Moreover, this Court notes that the Third Circuit, in a non-precedential, unreported opinion, held a charge valid which contained language quite similar to the language at issue in the instant case. Thompson v. Kelchner, No. 01-3406, 2002 WL 31027892 (3rd Cir. May 8, 2002), cert. denied, 2002 WL 31040794 (U.S. November 4, 2002)(No. 02-6086). The subject jury instruction in Thompson stated that "Reasonable doubt is not merely any imagined

Upon review of the transcript of the entire jury charge, it does not appear that the charge as a whole would lead a jury to conclude that it could convict on less than reasonable doubt. As noted, *supra*, the allegedly offensive instruction reads as follows:

Furthermore, the defendant is presumed innocent throughout the trial and remains so unless and until you conclude, based upon a careful and impartial consideration of the evidence or lack of evidence, that the Commonwealth has proven him guilty beyond a reasonable doubt.

(N.T. at 668.) The paragraph immediately following this passage reads:

It is not the defendant's burden to prove that he is not guilty. Instead it is the Commonwealth that always has the burden of proving each and every element of each of the crimes charged and that the defendant is guilty of these crimes beyond a reasonable doubt.

The person accused is not required to present evidence or prove anything in his own defense. If the Commonwealth's evidence fails to meet its burden, then your verdict must be not guilty. On the other hand, members of the jury, if the Commonwealth's evidence does prove beyond a reasonable doubt that the defendant is guilty then your verdict should be guilty

or passing fancy that may come into the mind of the juror, it must be doubt arising from the evidence that is substantial and well founded on reason and common sense." *Id.* at *4 (Quoting jury instructions). The Third Circuit held this instruction Constitutional after considering other parts of the charge which properly explained to the jury both the government's burden of proof and the meaning of reasonable doubt. The court noted that "When read in context those sentences challenged simply because they did not repeat the 'void, absence or lack of evidence' language cannot fairly be said to eviscerate or contradict the extensive and correct instructions given by the trial court." *Id.* at *6.

(Id.) A later section of the charge again uses language indicating that reasonable doubt must arise from evidence presented at trial. Specifically, the judge states:

A reasonable doubt is a doubt that would cause a reasonably careful and sensible person to hesitate before acting upon a matter of importance in his or her own affairs. A reasonable doubt must be an honest doubt arising out of the evidence itself, the kind of doubt that would restrain a reasonable person from acting in a manner of importance to himself or herself.

(Id. at 669). However, again in the very next passage, the judge states:

A reasonable doubt must fairly arise out of the evidence that was presented or out of the lack of evidence presented with respect to some element of the crime.

A reasonable doubt, members of the jury, must be a real doubt. It may not be an imagined one nor may it be a doubt manufactured to avoid carrying out some unpleasant duty.

(Id.) While the jury charge undoubtedly could have been more clear, when read as a whole it does not create a reasonable likelihood that the jury interpreted the instructions to allow conviction using a standard other than beyond a reasonable doubt. Victor, 511 U.S. at 16; see also Vargas v. Keane, 86 F.3d 1273, 1280 (2d. Cir. 1996)(noting that, on habeas review, a court's inquiry "is whether the [jury] instruction is constitutional, not whether it is exemplary.") It is true that, where a jury instruction contains a serious legal error, correct statements of the law in other portions of the charge may not

always serve to correct this error, and may instead confuse the jury and irrevocably taint the verdict. See Whitney v. Horn, 280 F.3d 240 (3d Cir. 2002) (invalidating jury verdict where jury charge contained both correct and clearly incorrect statements of the law surrounding the defense of voluntary intoxication.) The charge in this case, however, was not likely to have created the type of juror confusion present in Whitney. The portions of the charge instructing that reasonable doubt must arise out of the evidence itself, and that reasonable doubt could be overcome based upon the evidence or lack of evidence presented, were most likely used to admonish the jury that it could not base its decision on sympathy for the defendant, public opinion or other inappropriate factors or prejudices. It is unlikely that a jury would instead interpret these passages to allow them to convict while possessing a level of certainty below that required by the Constitution. This is especially so when one considers later portions of the charge stating that reasonable doubt *may* arise based upon the lack of evidence presented, and distinguishing reasonable doubt from a mere imagined doubt. Cf. Victor, 511 U.S. at 20 (upholding charge distinguishing substantial doubt from doubt arising from mere possibility or fanciful conjecture.)

III. CONCLUSION

As Williams has not presented a claim that implicates Cage

v. Louisiana or any other rule of law which can be held retroactive to his case on collateral review, the Court dismisses his habeas petition as time-barred. In the alternative, Williams' petition fails on the merits, as the jury instruction given in his case was not constitutionally defective under Cage v. Louisiana.

An appropriate order follows.

